STATE OF MICHIGAN

COURT OF APPEALS

PAL MARIA BROOKS,

Plaintiff-Appellee,

v

ALEX BROOKS,

Defendant-Appellant.

UNPUBLISHED
September 13, 2007

No. 270939
Wayne Circuit Court
Family Division
LC No. 04-410686-DM

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment of divorce, wherein the trial court ordered that he pay child support for a child later proven not to be his. On appeal, defendant challenges the trial court's order denying his motion for summary disposition and the order denying his motion to determine paternity. We reverse the order denying summary disposition, reverse the order denying the motion to determine paternity, and remand for entry of an order establishing paternity and for modification of the child support provision of the judgment of divorce.

Wesley Alexander Brooks was born to plaintiff on January 4, 1993, at which time plaintiff and defendant were in a "relationship," but they were not married. The parties subsequently married on October 17, 1993. Plaintiff gave birth to Jonathan Xavier Brooks on July 3, 1994. Defendant raised both Wesley and Johnathan as his own children, believing that to be true. The parties separated in December of 2001 or January of 2002. Defendant was awarded parenting time, but he chose not to exercise it; as of March 9, 2006, he had not seen either of the children in three years.

On April 9, 2004, plaintiff filed a complaint for divorce. Plaintiff asserted that she and defendant were the parents of both children. Plaintiff requested joint legal custody and primary physical custody, as well as child support. On May 17, 2004, the trial court entered an ex parte order that awarded the parties joint legal custody, awarded plaintiff physical custody, and awarded defendant parenting time on alternate weekends. The trial court ordered defendant to pay $962 a month for child support for both children.

On October 22, 2004, defendant learned that he was not Wesley's biological father. He moved the trial court to determine that he was not Wesley's father and modify its ex parte order

requiring him to pay child support. On November 5, 2004, the trial court conducted a hearing on defendant's motion, but plaintiff did not appear. The trial court instructed defendant to submit a seven-day order.[1] Defendant submitted a seven day notice of entry of an order, which provided that defendant, was not Wesley's biological father and modified the ex parte child support order. Plaintiff objected, contending that defendant had held himself out as Wesley's father for approximately 12 years, given Wesley his last name, taught Wesley to call him Dad, and financially supported Wesley. Plaintiff argued that defendant should be estopped from asserting that he was not Wesley's biological father.

The trial court reconvened on November 28, 2005. Apparently, the parties and the trial court had reached an agreement off the record that the next appropriate step was for defendant to file a motion for summary disposition because an evidentiary hearing was never conducted regarding the issue of paternity. The parties stipulated to the following facts and agreed that the motion for summary disposition would resolve any questions of law: (1) Wesley was born before the parties married, and there was no affidavit or acknowledgment of parentage; (2) the DNA test showed that defendant was not Wesley's biological father; and (3) defendant held himself out to Wesley and the public as Wesley's father.

On April 19, 2006, the trial court denied defendant's motion for summary disposition under MCR 2.116(C)(10). The trial court found that defendant had failed to demonstrate that the facts upon which the trial court based its 2004 ruling were different than the current facts, and it held that defendant was estopped from denying that he raised Wesley as his own child and supported him for 11 years. Regarding the issue of child support, the trial court found that defendant was obligated to pay child support because he was estopped from denying that he was Wesley's father.

On May 18, 2006, the trial court entered a judgment of divorce. The judgment awarded plaintiff legal and physical custody of the children and ordered defendant pay $940 a month in child support. The trial court also ordered both parties to provide health care coverage for the children. Uninsured medical expenses for the children were apportioned 60 percent to plaintiff and 40 percent to defendant. Defendant appeals as of right, contesting those portions of the divorce judgment relating to his obligations to Wesley Brooks.

Defendant argues that the trial court erred in finding that he was estopped from denying that he was the father of Wesley because Wesley was born before the parties married. We review de novo a trial court's decision on a motion for summary disposition. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). The application of estoppel in the instant case requires consideration of the fact that defendant was not the biological father. Therefore, we review the decision using the standard for MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other evidence in the light most favorable to the party opposing the

[1] See MCR 2.602(B)(3).

motion. *Zsigo*, *supra* at 220. We also review de novo questions of statutory interpretation, *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006), and equitable estoppel, *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 309; 583 NW2d 548 (1998).

A man may be considered a parent under the Child Custody Act if the child was born in wedlock and the presumption of paternity applies, if there has been a prior court determination that he is the parent of a child who was born out of wedlock, or if he has acknowledged parenthood of a child born out of wedlock. *Aichele v Hodge*, 259 Mich App 146, 167; 673 NW2d 452 (2003). An adoptive father is also a parent for purposes of the Child Custody Act. MCL 722.22(h). Similarly, MCR 3.903(A)(7) defines "father," in pertinent part, as follows:

> (a) A man married to the mother at any time from a minor's conception to the minor's birth, unless a court has determined, after notice and a hearing, that the minor was conceived or born during the marriage, but is not the issue of the marriage;
>
> (b) A man who legally adopts the minor;
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> (c) A man who by order of filiation or by judgment of paternity is judicially determined to be the father of the minor;
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> (d) A man judicially determined to have parental rights; or
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> (e) A man whose paternity is established by the completion and filing of an acknowledgment of parentage in accordance with the provisions of the Acknowledgment of Parentage Act, MCL 722.1001, *et seq.*, or a previously applicable procedure.

Under the paternity act, MCL 722.711, *et seq.*, the parents of a child born out of wedlock are liable for the child's support and education. MCL 722.712. Because Wesley was conceived and born when plaintiff was not married, he is considered born out of wedlock. MCL 722.711(a). Therefore, pursuant to MCL 722.717(1), a trial court can enter an order of filiation under the following circumstances: (1) the man is determined to be the father by court finding or verdict, (2) the man acknowledges paternity orally to the court or by filing a written acknowledgement of paternity, or (3) a default judgment is entered against a man who fails to respond to a summons. In this matter, the trial court never entered an order of filiation, defendant never acknowledged paternity orally to the court, and he never filed a written acknowledgement of paternity. Rather, defendant questioned paternity in pleadings he filed subsequent to plaintiff's complaint for divorce.

The Acknowledgement of Parentage Act provides that, if a child is born out of wedlock, a man is considered to be the natural father if he joins with the mother and acknowledges the child as his child by completing an acknowledgement of parentage form. MCL 722.1003(1). It is undisputed that defendant never completed an acknowledgment of paternity form, so the Acknowledgement of Parentage Act does not apply to the instant case.

Other than adoption, Michigan recognizes two doctrines that can determine a person who is not a biological parent to be a legal parent: the equitable parent doctrine and equitable

estoppel. *Bergan v Bergan*, 226 Mich App 183, 186; 572 NW2d 272 (1997). This Court adopted the equitable parent doctrine in *Atkinson v Atkinson*, 160 Mich App 601, 604, 608-609; 408 NW2d 516 (1987). In that case, the child was born during the parties' marriage and the defendant asserted during the divorce proceedings that the plaintiff was not the child's father. See also *Van v Zahorik*, 460 Mich 320, 330; 597 NW2d 15 (1999). The equitable parent doctrine provides that a husband who is not the biological father may be considered the biological father of a child conceived or born *during the marriage* if (1) the husband and child mutually acknowledge a father-child relationship or the mother has helped develop such a relationship, (2) the husband desires to have the rights afforded a parent, and (3) the husband is willing to assume the responsibility of paying child support. Because Wesley was not born during the marriage, the equitable parent doctrine does not apply.

The doctrine of equitable estoppel applies when (1) a party induces another to believe facts to be true, (2) that other person justifiably relies and acts on those facts, and (3) it would be prejudicial if the first party is then permitted to deny those facts. *Van*, *supra* at 335. The inducement can be intentional or negligent, and it can be by representations, admissions, or silence. *Id.* A husband can be estopped from denying the paternity of a child who is not his biological child but is born during his marriage to the mother. *Id.* In *Van*, the Michigan Supreme Court declined to extend this doctrine beyond the context of marriage. The Court explicitly overruled this Court's decision in *Guise v Robinson*, 219 Mich App 139, 146-147; 555 NW2d 887 (1996), which had applied the doctrine of equitable estoppel to hold a man responsible even though he was not the child's biological father and had never married the child's mother. *Van*, *supra* at 336. Further, equitable estoppel is not appropriate because, as in *Bergan*, *supra* at 187-188, defendant had believed Wesley to be his child, so defendant never had a reason to affirmatively represent that he would raise Wesley as his own. The trial court erred in relying on this doctrine to estop defendant from denying that he is the child's father.

MCL 722.28 provides that child custody orders and judgments shall be affirmed on appeal unless the trial court made "findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." *Fletcher v Fletcher*, 447 Mich 871, 877-881; 526 NW2d 889 (1994). A finding of fact is against the great weight of the evidence if the evidence "clearly preponderates in the opposite direction." *Id.* at 879, quoting *Murchie v Std Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959). This Court reviews the trial court's discretionary rulings, including custody decisions, for an abuse of discretion. *Fletcher*, *supra* at 879-881. We review questions of law for clear legal error, which occurs when a court incorrectly chooses, interprets, or applies the law. *Id.* at 881.

Because defendant has no legally recognizable relationship with the child, he may not be required to pay child support. *Bergan*, *supra* at 188. Therefore, the trial court abused its discretion in ordering him to pay child support for this child. We remand this matter to the trial court for entry of an order establishing that defendant is not the parent of Wesley and for modification of the child support provision of the judgment of divorce consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Bill Schuette
/s/ Stephen L. Borrello